Supreme Court of the United States

OCTOBER TERM, 1943

No.

UNITED STATES OF AMERICA *ex rel.* WINFRED WILLIAM LYNN,

Petitioner,

—against—

COLONEL JOHN W. DOWNER, Commanding Officer at Camp Upton, New York,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Jurisdiction.

The statement of jurisdiction is in the foregoing petition.

Statement of the Case.

The facts have been set forth in the foregoing petition.

SUMMARY OF ARGUMENT

POINT I.

The selection and induction of petitioner pursuant to the Negro quota requisition, in conjunction with the separate Negro delivery list, was discrimination against him on account of race or color and in violation of the statute.

POINT II.

The judgment of the Circuit Court of Appeals should be reversed, and petitioner should be discharged.

ARGUMENT

POINT I.

The selection and induction of petitioner pursuant to the Negro quota requisition, in conjunction with the separate Negro delivery list, was discrimination against him on account of race or color and in violation of the statute.

The law says there should be no discrimination because of race or color. Col. McDermott says that color has something to do with the time men are called. Is this, or is this not, discrimination?

The word "discriminate" is defined in Webster's New International Dictionary (2d ed.) as follows:

> "* * * having the difference marked * * * distinct; * * * to serve to distinguish; to mark as different; to differentiate; * * * to separate by discerning differences; to distinguish; * * * to make a distinction; * * * to make a difference in treatment or favor (of one as compared with others) * * *"

In the Standard Universal Dictionary, "discriminate" is defined:

> "To note the differences between; note or set apart as different; differentiate; distinguish; * * * to make a distinction."

The word "discrimination" is defined by Webster and the Standard Universal Dictionary as:

> "The act of discriminating or state of being discriminated; * * * a distinction as in treatment; * * * difference in treatment * * *."

The monumental New English Dictionary prepared by . J. A. H. Murray and other Oxford scholars, defining phrase "to discriminate against," says (Vol. 3, p. 436):

> "* * * to make an adverse distinction with regard to; to distinguish unfavourably from others."

The word discriminated is derived from the Latin "dis-imino" which means "to divide," "to distinguish."

It may be that colloquially and on occasion the term is ed to indicate an unfair, injurious and unjust distinction, t the statute here refers not to unjust, or unfair or in-rious discrimination, but to discrimination.

It should be noted that in the last war, the Selective raft Act of 1917 (50 U. S. C. A. App. Sec. 201) did not ovide against discrimination. The purpose of that clause the Act of 1940 was clearly to prevent officials who were dministering the Act from making any differentiation based race or color.

The provision originated in an amendment offered by ongressman Fish. 86 Cong. Rec. 11,675, col. 1. The Fish nendment, in almost exactly the same language as now ppears in the Statute, read:

> "Provided, That in the selection and training of men, as well as in the interpretation and execution of the provisions of this act, there shall be no discrimination against any person on account of race, creed, or color."

his was immediately objected to on the ground that the me provision was already in the Bill before the House. 6 Cong. Rec. 11,675, Col. 1. The ruling of the Chairman as, however (86 Cong. Rec. 11,675, Col. 2):

> "The Chairman (Mr. Warren in the chair). Subsection (a) of section 4 provides that 'the selection of

men subject to the training and service provided for in section 3 (other than those who are voluntarily inducted pursuant to his act) shall be made in an impartial manner,' and so forth. The Chair regards the amendment as a further clarification and holds that it is in order and therefore overrules the point of order."

Thereupon there was a sharp debate, not in opposition to the principle expressed, but on the ground that the provision was unnecessary, as already incorporated in the Act. The amendment was supported, however, as Judge Clark said (R. 71, fol. 72), "to make assurance sure and to quiet the doubts of representatives of the colored people." Congressman Fish said he was not the originator of the amendment, but sponsored it by request of a group of prominent colored leaders "who are interested and represent the interests of eleven million Negroes in America." 86 Cong. Rec. 11,675, 11,676.

At length, after one vote wherein the amendment appeared to be lost, it finally passed the House by a vote of 121 to 99. 86 Cong. Rec. 11,680.

We think it is clear that the expressed Congressional intent was and is that whites and Negroes are to be selected for service without discrimination.

The facts show, however, that whites and Negroes are not treated the same. Under the Selective Training and Service Act, a lottery of selective service numbers was held. American citizens were to be chosen in the order to which their numbers were drawn. This applied to colored men, white men, Indians, Catholics, Jews, Protestants and every other group in the country. There can be no more justification for calling colored men otherwise than serially, than there could be for calling Catholics, Jews and Protestants according to their religion, rather than according to their numbers.

Can it be said that men are not treated differently where the local boards are called upon for different quotas? If a citizen is called later than his turn, there is quite as much discrimination against him as if he is called earlier than his turn. He has a legal right to be chosen according to his number. The evidence shows this is not done so far as Negroes are concerned. It was not done in this case. The facts warrant no conclusion other than that Negroes are not called serially and in their turn. Is this discrimination? We submit that the treatment of one citizen differently from another constitutes discrimination.

In answer to this, the following arguments may be made by the government:

A

The statute says there should be no discrimination against any person on account of race or color. Does it follow from this that discrimination is permissible if it is *not against any person?* It is submitted that discrimination against a group is discrimination against every person in that group. It may be claimed that while there is discrimination, it is not *"against."* It is submitted that discrimination of any kind is discrimination "against" as well as "for." The regulations make clear the intent of the Act. They provide that there shall be no discrimination "for or against" any person because of his race, creed or color, and that "each registrant shall receive equal and fair justice."* Further than this, the Selective Training and Service Act (50 U. S. C. A. App. §304 (a)), says selection "shall be made in an impartial manner." The purpose of the Act was to assure that all American citizens should be treated alike.

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* Selective Service Regulation, 2nd Ed., Sec. 623.1.

B

It has been suggested that it may well have been that under the method of selecting inductees, petitioner suffered no disadvantage, that if he had been called strictly in his turn according to his order number as determined by the national lottery, he might have been called sooner, and that therefore he has nothing of which to complain. It is submitted that this would not excuse discrimination. Any such argument assumes that it is an advantage to a man not to be called in his turn. Some of us feel that it is an honor to serve the country, that one might well be prejudiced through a denial of his right to serve at the proper time. In the Court below, with reference to the Government's suggestion that petitioner was not injured if he was called later than his turn, Judge Clark said (R. 74; fol. 76):

> "* * * But I do not think the supposition can be accepted as being in accord with the habits and thoughts of patriotic citizens during the present crisis or permitted by the statute, which requires that there be no discrimination for color, not that there be no legally disadvantageous discrimination. This registrant asserts his desire to serve and his willingness to do so if inducted according to law. I think it unsound to overlook a violation of law as to him on a premise which we ourselves would reject as patriotic citizens and which is contrary to the whole spirit of the Act, namely, that avoidance of service is to be desired. * * *"

At any rate, petitioner's complaint is that he was not called in his turn pursuant to the requirements of the law; that he was called out of his turn because of his color. Whether or not he would have been called sooner or later

under the circumstances has nothing to do with the question at issue. Petitioner makes no complaint that as a citizen, he was called upon to fight for his country. He does complain that his people are not granted their rights. He insists upon his rights, whatever might be the effect upon him personally.

C

Argument might be made that, in view of the fact that there are separate quotas, white men are called out of their turn, and that therefore there is no discrimination between them and Negroes. This is equivalent to saying that there is discrimination against whites as well as against Negroes. This was the testimony of Mr. Black (R. 31, fol. 92), connected with the Selective Service Headquarters in New York (R. 42, fol. 126). Indeed, strong complaint against discrimination against whites in favor of Negroes has recently been made on the floor of Congress, where Congressman McKenzie of Louisiana quotes from a Louisiana newspaper a statement that from a certain Parish in that State there have been called for military service a group of married men with pre-Pearl Harbor children, while 267 Negro single men remain on the Class 1-A list, and that both white and Negro citizens are disturbed by the discrimination. 89 Cong. Rec. A-5268, A-5269.

D

Argument might be made that petitioner has not proved that he was not called at precisely the same time as that at which he would have been called had men been inducted strictly according to their order numbers, irrespective of the separate quotas for whites and Negroes. The answer to this is that such an outcome would be wholly coincidental. The mathematical probabilities and possibilities are such

that this result is so unlikely that it can be ignored. That petitioner would be called at the same time under either method of selection would not happen in one case out of tens of thousands, or perhaps millions.

Using the requisition of August 7th (Exhibit 1, R. 55, fol. 163) as an example, the record shows by the testimony of the Selective Service officials, that the local board has its lists of registrants, known as delivery lists; that the local board has separate delivery lists—one for Negroes and one for whites, though there is only one series of order numbers (R. 13-14, fols. 39-41); that, on receiving the requisition for 90 whites and 50 Negroes, the local board first takes the Negro list, counts down on it the first fifty class 1-A Negroes and calls them for induction; that then the local board takes the white list and counts down on it the first ninety whites, and calls them for induction. In other words, the Negroes and whites are not on one delivery list in the order of their order numbers, as determined by the national lottery, to be taken indiscriminately according to such order numbers; but, after the order numbers are determined indiscriminately, the Negroes and whites are separated and thereafter dealt with as separate groups on separate lists by separate requisitions.

To use these actual numbers for the purposes of example, let us suppose that 180 white men and 100 Negroes were available to the local board (following the proportions as shown by Relator Exhibit 1). Now let us suppose that on the list of eligible and available men, the first 140 men, according to order numbers, were white; that the next 100 men on the list, according to order numbers, were Negroes; and that the last 40 men, on the list of 280 available and eligible men, were white. Let us further suppose that the present requisition came to the local board, calling for 90 whites and 50 Negroes. According to the present system,

the board takes the Negro list and counts down the first 50 Negroes and calls them for induction (R. 15-16, fols. 45-46), so that it is inevitable that 50 Negroes will be called; and then the Board takes the white list and counts down the first 90 whites, and calls them for induction. But if only one list were used, containing the mixture of whites and Negroes which we have supposed, the result would be as follows: The Board would count down on the one list the first 140 men, and it would happen that these first 140 men would all be whites, so that no Negroes would be inducted under that requisition.

We cannot think that in a case so vitally affecting the lives, liberties and rights of great bodies of American citizens, it can be required that the petitioner's complaint should be disposed of on the basis of the bare possibility that it might have happened that petitioner would have been called for induction under the present system at exactly the same time as if he had been selected without the use of a separate Negro quota and a separate Negro delivery list.

Moreover, as Judge Clark wrote in the Court below (R. 73, fol. 76):

> "* * * It is suggested, however, that even if the statute is violated, this registrant cannot take advantage of it, for he has not shown that his call was not delayed; rather than accelerated, by the practice, with the further correlative supposition that delay must of necessity be an advantage. Even if this supposition is to be accepted, there was evidence in the record that Negroes might be called in advance of whites, that in fact a call for Negroes would be allocated 'to those boards where Negroes are'; and since this was a matter peculiarly within the Government's knowledge, it would

seem under the circumstances to have the burden of going forward with the evidence. * * *"

E

It has been argued that petitioner failed to prove that he was inducted under this system of separate quota lists. This contention was overruled by all of the Circuit Court of Appeals, the majority as well as the dissenting judge (R. 65, fol. 66).

F

It may be argued that this case is parallel with those where state laws have been held constitutional which provide for the separation of races in the enjoyment of privileges, if the privileges given to the separate groups are equal. See *Gong Lum* v. *Rice* (1927), 275 U. S. 78; *Missouri ex rel. Gaines* v. *Canada* (1938), 305 U. S. 337; *Plessy* v. *Ferguson* (1896), 163 U. S. 537. These cases are wholly inapplicable. They deal only with the question of the power of the state as limited by the equal protection and due process provisions of the Fourteenth Amendment of the Federal Constitution. The situation is quite different in the present case, which deals with a function of the federal government, governed by federal law, and wherein the federal law specifically provides that there shall be no discrimination.

Judge Clark's answer to the Government's contention in this respect was as follows (R. 74; fols. 76-77):

"It is to be noted that in final analysis the case for the validity of the call here rests upon the policy of segregation, where equal facilities are afforded, as sanctioned by various Supreme Court decisions. But actually these precedents call for the contrary result. It must not be overlooked that they do insist upon *equal* accom-

modations, which here must mean equal calls to service. * * *"

G

Finally, it may be argued that if petitioner's contention is upheld, the entire army system of the United States would have to be reorganized.

Again Judge Clark answered this contention in the Court below (R. 74; fol. 76):

> "* * * notwithstanding the fears expressed by the United States Attorney, this cannot mean the release from the Army of large numbers of soldiers; alike with volunteers, those who have gone into service properly without immediately raising any objections they have, and relying upon them as steadfastly as did this registrant here, surely have no ground to approach the court."

Since the Act applies to training as well as to the selection of men, we submit that there is no legal warrant for discrimination in the armed forces. That issue, however, is not in this case. If it were, the case might raise the question of whether or not there were equal accommodations.

This case raises the question of discrimination in selection only. Petitioner objects to selection by civilian boards under a separate Negro quota in the draft call. The illegal act was completed when he received the notice to appear for induction. What happened to him thereafter is not decisive of this question. It may very well be that selection in racial quotas facilitates the Army policy of segregating Negroes in training. So, too, might the desire of the Army for able-bodied men be satisfied by ordering conscientious objectors to report to the armed services. But the end attained does not validate the means employed. In both in-

stances it might be found that the resulting service was illegal and writs granted not only because of the character of the service but because of the manner in which it was procured.

As the Court said in *Ver Mehren* v. *Sirmyer* (C. C. A. 8th, 1929) 36 F. 2d 876, 881:

> "The induction of a civilian into military service is a grave step, fraught with grave consequences. * * * But what we emphasize is the necessity that all the steps prescribed by statute, and by regulations having the force of law, shall be strictly taken before it can be held that a person has been lawfully inducted into the military service. * * *"

CONCLUSION

It may appear to the court that in our argument from (A) to (G) we have set up straw men in order to knock them down; but, as appears from the record, these are the kind of arguments the Government made in the courts below. We submit that the only question here is as to whether the selection of citizens in the draft, not strictly according to order number, but in part because of color, constitutes differentiation, and whether or not this differentiation is discrimination. When we recall that the present method is not different in substance from that used in the last war, and that Congress added to the present Act the provision prohibiting discrimination, we might well ask ourselves what the prohibition means. We submit that by the new words, Congress intended that the selection of men by civilian boards should be made strictly according to order number, that men have a right to be so chosen; that they have a right to be called in their turn as American citizens without regard to race or color.

POINT II.

The judgment of the Circuit Court of Appeals should be reversed, and petitioner should be discharged.

Respectfully submitted,

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On the Brief:

CONRAD J. LYNN,
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